



SIGNED this 12th day of October, 2021

Nicholas W. Whittenburg
Nicholas W. Whittenburg
UNITED STATES BANKRUPTCY JUDGE

IN THE UNITED STATES BANKRUPTCY COURT FOR
THE EASTERN DISTRICT OF TENNESSEE
WINCHESTER DIVISION

In re:)	
)	
Crystal Dawn Rigney,)	No. 4:20-bk-12437-NWW
)	Chapter 7
Debtor.)	
_____)	
)	
Dr. Gil Center for Back, Neck)	
and Chronic Pain Relief,)	
)	
Plaintiff.)	
)	
v.)	Adv. No. 4:21-ap-01002-NWW
)	
Crystal Dawn Rigney,)	
)	
Defendant.)	

M E M O R A N D U M

Before the court is the defendant's post-judgment motion for an award of attorney's fees totaling \$12,120.00 pursuant to 11 U.S.C. § 523(d). Having considered

the motion and the plaintiff's response, and based on the entire record in this adversary proceeding, the court denies the motion.

I. Background

In November 2015, the defendant was involved in an automobile collision. She suffered injuries and sought treatment from the plaintiff during the spring of 2016.

As a condition to receiving treatment, the defendant executed an Assignment of Insurance Benefits and Proceeds of Claim and an Assignment of Benefits and Payment Agreement (collectively, the "Assignments"). Pursuant to the Assignments, the defendant assigned to the plaintiff her interest in any insurance benefits to the extent of charges for the plaintiff's services. Additionally, the defendant executed a Doctor's Lien whereby she granted the plaintiff a lien encumbering the proceeds of any settlement, judgment, or verdict resulting from the collision.

After receiving her last treatment from the plaintiff, the defendant received \$25,000.00 from Progressive Insurance Company, the insurance company providing liability coverage for the other driver to the collision. Although the proceeds had been assigned to the plaintiff, she did not use any of the proceeds to pay the plaintiff's outstanding balance totaling \$4,835.00. The defendant filed a petition for relief under chapter 7 of the Bankruptcy Code on September 14, 2020. The plaintiff commenced this adversary proceeding with the filing of its complaint on January 18, 2021.

The complaint sought a declaration that the \$4,835.00 debt owed to the plaintiff for chiropractic service rendered was nondischargeable pursuant to 11 U.S.C. § 523(a)(2)(A) (money, property or services obtained by false pretenses, a false representation, or actual fraud), § 523(a)(4) (fraud or defalcation while acting a a

fiduciary capacity, embezzlement, or larceny), and § 523(a)(6) (willful and malicious injury). As explained more fully in the court's July 8, 2021 order, on cross-motions for summary judgment, the court dismissed the 11 U.S.C. § 523(a)(2)(A) count. Doc. no. 17. A trial was conducted on August 16, 2021, for the remaining two counts. Following the trial the court declined to declare the debt nondischargeable for the reasons stated in the court's memorandum opinion entered on August 27, 2021. Doc. no. 25. The defendant timely filed the pending motion for attorney's fees pursuant to 11 U.S.C. § 523(d).

II. Legal Analysis

For lawsuits based upon federal law, the "American rule" is that each party is responsible for its own attorney's fees, unless a statute or an agreement between the parties specifically provide otherwise. See *Alyeska Pipeline Serv. v. Wilderness Soc'y*, 421 U.S. 240, 257 (1975). The defendant cites 11 U.S.C. § 523(d) as a statutory predicate for shifting responsibility for payment of the defendant's legal fees from the defendant to the plaintiff. This section states:

If a creditor requests a determination of dischargeability of a consumer debt under subsection (a)(2) of this section, and such debt is discharged, the court shall grant judgment in favor of the debtor for the costs of, and a reasonable attorney's fee for, the proceeding if the court finds that the position of the creditor was not substantially justified, except that the court shall not award such costs and fees if special circumstances would make the award unjust.

Courts have interpreted Section 523(d) to contain four elements: 1) a creditor requests a determination of dischargeability under Section 523(a)(2), 2) the debt is a consumer debt, 3) the consumer debt is discharged, and 4) the creditor's position lacks substantial justification. See, e.g., *Rochester Hills Chrysler Plymouth v. Phillips (In re*

Phillips), 153 B.R. 758, 763 (Bankr. E.D. Mich. 1993). The debtor bears the burden of proving the first three elements, and then the burden shifts to the creditor to demonstrate that its position was substantially justified. See, e.g., *Am. Sav. Bank v. Harvey (In re Harvey)*, 172 B.R. 314, 317 (B.A.P. 9th Cir. 1994). If the position was unjustified, then the court considers whether there are any special circumstances that would make an award of attorney's fees unjust. *Phillips*, 153 B.R. at 763.

A. While the Defendant Has Satisfied Her Burden of Proof Under Section 523(d), She Is Not Entitled to Recover the Full Amount of the Attorney's Fees Requested.

Undisputably, the first three elements of Section 523(d) have been satisfied. The complaint seeks a declaration that the defendant's debt to the plaintiff is nondischargeable pursuant to Section 523(a)(2). The debt for chiropractic services is a "consumer debt" within the definition of 11 U.S.C. § 101(8). Finally, the court determined after a trial that the debt is dischargeable, and the defendant has received a discharge. Having satisfied her burden of proof, the defendant maintains that, absent a showing by the plaintiff that the filing of the complaint was substantially justified or that special circumstances exist rendering the award unjust, she is entitled to recover all the legal fees incurred in successfully defending the action. The court disagrees.

By its terms, Section 523(d) provides for the recovery by a debtor of reasonable attorney's fees incurred successfully defending a request to declare a consumer debt nondischargeable under only Section 523(a)(2). If a creditor's challenge to the dischargeability of a debt is premised on other grounds, such as Section 523(a)(4) and 523(a)(6), Section 523(d) has no application. See, e.g., *Colbert v. Colbert (In re Colbert)*, 185 B.R. 247, 248 (Bankr. M.D. Tenn. 1995) (citing *In re Myers*, 61 B.R. 891,

896 (Bankr. N.D. Ga.1986)); *Swenby v. Swenby (In re Swenby)*, 529 B.R. 705, 710–11 (Bankr. W.D. Wis. 2015) (denying award of fees because resources devoted to Section 523(a)(2) were trivial compared to resources dedicated to Section 523(a)(4) and (6)); *Grynevich v. Grynevich (In re Grynevich)*, 172 B.R. 888, 894 (Bankr. N.D. Ill. 1994) (denying award of fees because determination was sought pursuant to Section 523(a)(4), (5), and (6), not Section 523(a)(2)); *Phillips*, 153 B.R. at 763–64 (awarding reduced fees related to Section 523(a)(2) only, not Section 523(a)(4) and (6)). Because the plaintiff's complaint asserted counts under Section 523(a)(4) and (a)(6) in addition to a count under Section 523(a)(2)(A), even assuming that the plaintiff's position was not substantially justified and that special circumstances do not exist making the award unjust, the defendant would be entitled to recover the attorney's fees she incurred in the defense of only the latter count.

The defendant's motion included an itemized statement of legal fees. The statement does not separate the time entries for legal services rendered for the defense of each count in the complaint. Certainly the fees incurred preparing for and participating in the trial after the court granted in part the defendant's motion for summary judgment dismissing the Section 523(a)(2)(A) count are not recoverable. Considering the remainder of the statement, it is impossible for the court to determine the fees attributable solely to the defense of the Section 523(a)(2)(A) count. In the court's experience, attorneys do not regularly maintain time records based on time devoted to each count in a multi-count complaint. It would be difficult to do so in a case such as this in which the same purported misconduct, the defendant's misappropriation of insurance proceeds, served as the factual foundation for each count. It may be

possible for the defendant's counsel, after reviewing his file and time records, to amend the statement or to provide evidence to assist the court to fairly allocate the fees incurred in the defense of the Section 523(a)(2)(A) count. However, further refinement of counsel's fee statement is unnecessary because, as discussed below, the court finds that the plaintiff's inclusion of the count under Section 523(a)(2) was substantially justified.

B. The Plaintiff Was Substantially Justified in Its Decision to Assert a Claim Under Section 523(a)(2).

Section 523(d) was modeled after the Equal Access to Justice Act, and when defining "substantially justified" in that act, the Supreme Court held it to mean that a claim has a reasonable basis in both law and fact. *Pierce v. Underwood*, 487 U.S. 552, 565 (1988) (interpreting the term "substantially justified" as used in 28 U.S.C. § 2412(d)(1)(A)); *see also First Card v. Hunt (In re Hunt)*, 238 F.3d 1098, 1103 (9th Cir. 2001) (citations omitted). Therefore, for an action to declare a consumer debt nondischargeable under Section 523(a)(2) to be "substantially justified," the creditor bears the burden of showing that: 1) there is a reasonable basis for the facts asserted, 2) there is a reasonable basis in the law for the legal theory proposed; and 3) there is support for the legal theory based on the alleged facts. *Fia Card Servs., N.A. v. Dunbar (In re Dunbar)*, No. CV 11-159-M-DWM, 2012 WL 1757427, at *2 (D. Mont. 2012); *Com. Fed. Bank v. Pappan (In re Pappan)*, 334 B.R. 678, 683 (B.A.P. 10th Cir. 2005).

Section 523(a)(2)(A) excepts from discharge "any debt for money, property, [or] services, . . . to the extent obtained by false pretenses, a false representation, or actual fraud." The court acknowledges that by order entered on July 8, 2021, the court granted

in part the defendant's motion for summary judgment and dismissed the plaintiff's Section 523(a)(2)(A) count, reasoning that the record was devoid of any evidence suggesting the defendant made any false representation to induce the plaintiff to provide medical treatment. Doc. no. 17. The summary dismissal of that count suggests that its inclusion in the complaint was not substantially justified. However, finding that there was no genuine issue of fact regarding whether the defendant made a fraudulent misrepresentation does not end the inquiry.

Section 523(a)(2)(A) excludes from discharge debts for money, property or services obtained by "actual fraud" in addition to debts arising from a debtor's false pretenses and representations. *Husky Int'l Elecs., Inc. v. Ritz*, 578 U.S. 356 (2016) (holding that "actual fraud" in Section 523(a)(2)(A) encompasses fraudulent conveyance schemes, even when those schemes do not involve a false representation). Actual fraud does not require a misrepresentation by the debtor. *Id.* Actual fraud may involve any act of deceit, artifice, trick, or design intended to hinder, delay, harm, or cheat another. *Haney v. Copeland (In re Copeland)*, 291 B.R. 740, 760 (Bankr. E.D. Tenn. 2003); 4 COLLIER ON BANKRUPTCY ¶ 523.08[1][e] (Lawrence P. King ed., 15th ed. rev. 2002).

The entirety of the plaintiff's complaint rests on allegations that the defendant misappropriated insurance proceeds in which the plaintiff held a legal interest. Such misappropriation, if accomplished with the requisite fraudulent intent to cheat, hinder, or harm the plaintiff, may constitute "actual fraud" as that term is used in Section 523(a)(2)(A). Therefore, there is both a reasonable basis in the law for the plaintiff's reliance on Section 523(a)(2)(A) in its complaint and support for the legal theory based

on the facts alleged in the complaint. Thus, whether the plaintiff's inclusion of the Section 523(a)(2)(A) count in the complaint was substantially justified turns on whether there is a reasonable basis for the facts alleged in the complaint.

It is undisputed that prior to receiving treatment the defendant executed the Assignments whereby she assigned to the plaintiff any insurance proceeds to the extent necessary to satisfy the sums owing for services provided. She also granted the plaintiff a lien on any insurance proceeds to secure her debt to the plaintiff. It is also undisputed that the defendant received \$25,000.00 in proceeds, and contrary to the terms of the Assignments and Doctor's Lien, failed to remit any of the proceeds to the plaintiff. In her affidavit submitted in support of her motion for summary judgment and at trial, the defendant maintained that, at the time she received the insurance proceeds, she assumed that the plaintiff's charges for treatment had been paid by her health insurance carrier. Accordingly, it was the defendant's position that she did not act with any fraudulent intent necessary to support a declaration that the debt is nondischargeable under Section 523(a)(2), (4), or (6). On the other hand, at trial the plaintiff presented proof suggesting that the defendant was aware that the plaintiff did not seek payment of the charges from the defendant's health insurance carrier. Further, there was also proof suggesting that the plaintiff's agent had communicated with the defendant and that she was aware that the debt for services provided by the plaintiff remained outstanding prior to the defendant's receipt of the insurance proceeds. After considering the conflicting proof, the court accepted the defendant's position and declined to declare the defendant's debt nondischargeable by finding that the plaintiff had narrowly failed to satisfy its burden of proof. The court did not find that the plaintiff's

claims had no factual basis. Instead, the evidence only weighed marginally in the defendant's favor. Considering the entire record in this case, the court finds that the plaintiff's request for a declaration that its claim was nondischargeable pursuant to Section 523(a)(2)(A) had a reasonable basis in both law and fact. Accordingly, the court finds that the inclusion of such claim was substantially justified.

III. Conclusion

For the reasons stated herein, the court will enter a separate order consistent with this opinion denying the defendant's motion for an award of attorney's fees pursuant to Section 523(d).

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